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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-155

JOHN OLIVER SNOW,
Petitioner.

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is attached and contained in the Appendix.

JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for The Sixth Circuit on the 8th day of June, 1971.

The appeal sought is based on great public importance and questions of constitutional law.

QUESTIONS PRESENTED

1. Whether, the defendant was denied a fair and impartial jury trial by the exhortation to convict petitioner by the Assistant U. S. Attorney. The closing argument

was highly prejudicial and inflammatory and aimed at creating an air of prejudice and bias against the defendant.

The further question involved herein, was the closing argument of counsel for the United States of America so inflammatory as to preclude any thought by the jury of the defense of insanity in their deliberations bearing in mind an acquittal would have resulted in the full release of the petitioner.

2. Could the petitioner receive a fair and impartial trial under the standards created by Federal Law that a person acquitted by reason of insanity in a case such as this would gain freedom.

3. The various counts in the indictment charge more than one offense in each separate count of the indictment and as a direct result the government failed to prove the essential elements of the various counts contained in the indictment.

THE CONSTITUTIONAL PROVISION

(1) U. S. Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2) U. S. Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

FACTS

Petitioner was convicted in the United States District Court for the Southern District of Ohio, Western Division, of four counts of narcotics offenses and two counts concerning the unlawful possession of firearms.

It is conceded and was conceded throughout the trial that the petitioner was arrested at a motel in Cincinnati, Ohio and allegedly voluntarily allowed a search of his vehicle and person. That during the search government agents found a gun on his person, one in his vehicle, marijuana, heroin and cocaine in the vehicle.

The petitioner was charged with a six count indictment. A plea of not guilty was entered and a written plea of not guilty by reason of insanity.

The case was tried to a jury and ultimately ended in the conviction of the petitioner.

Facts relevant to the issues are the final argument of the Assistant U.S. Attorney, which were highly inflammatory and amounted to misconduct.

Further, petitioner moved that the narcotics charges against the defendant be dismissed because they did not sustain the burden of proof of all essential elements.

The United States Court of Appeals for The Sixth Circuit, affirmed the trial court and their opinion is contained in the Appendix page 1.

FEDERAL QUESTIONS RAISED

1. The petitioner through his attorney properly raised the question on appeal, that the closing argument

of counsel for the United States of America was impermissibly prejudicial. If counsel for the petitioner is correct the 5th and 6th Amendments of the United States Constitution has been violated.

2. As provided by Federal Law, a petitioner found not guilty by reason of insanity is granted complete freedom. Because of publicity pertaining to drugs this type defense in Federal Court is impossible because no juror could make such a finding and therefore both the 5th and 6th Amendments of the United States Constitution are violated.

3. The wording of the various counts of the indictment contain either separate and distinct crimes or lessor included offenses and as such deny the petitioner his rights as provided by the 5th Amendment of the United States Constitution as to due process of law.

I.

REASONS FOR ALLOWANCE OF THE WRIT

1. WHETHER, THE DEFENDANT WAS DENIED A FAIR AND IMPARTIAL JURY TRIAL BY THE EXHORTATION TO CONVICT PETITIONER BY THE ASSISTANT U.S. ATTORNEY. THE CLOSING ARGUMENT WAS HIGHLY PREJUDICIAL AND INFLAMMATORY AND AIMED AT CREATING AN AIR OF PREJUDICE AND BIAS AGAINST THE DEFENDANT.

THE FURTHER QUESTION INVOLVED HEREIN, WAS THE CLOSING ARGUMENT OF COUNSEL FOR THE UNITED STATES OF AMERICA SO INFLAMMATORY AS TO PRECLUDE ANY THOUGHT BY THE JURY OF THE DEFENSE OF INSANITY IN THEIR DELIBERATIONS BEARING IN MIND AN ACQUITTAL WOULD HAVE RESULTED IN THE FULL RELEASE OF THE PETITIONER.

2. COULD THE PETITIONER RECEIVE A FAIR AND IMPARTIAL TRIAL UNDER THE STANDARDS CREATED BY FEDERAL LAW THAT A PERSON ACQUITTED BY REASON OF INSANITY IN A CASE SUCH AS THIS WOULD GAIN FREEDOM.

For purposes which are clear Questions 1 and 2 will be argued together.

Closing argument of the Ass't Attorney General, was highly prejudicial and inflammatory and specifically aimed at creating an air of prejudice and bias against the defendant. Further, the closing argument created in the minds of the jurors the defendant had an obligation to provide witnesses to prove his plea of insanity and was a direct attempt to shift the burden of proof.

Referring the Court to "Excerpt of Proceedings" at page 30 (R) the following statements were made by the Ass't U.S. Attorney General,

> ****"*I have children. You, I am sure, have children. There is a drug problem in this country today.* In order to solve that problem, ladies and gentlemen of the jury, we have to eradicate the source of it and submit to you in all sincerity—*I am emotional involved; no question about it; I am—that John Snow is one of these sources.*
>
> (Emphasis Added)
>
> *How would you feel if you had a child who was introduced to the use of narcotics by a pusher?* I should apologize to you for prosecuting John Oliver Snow? I am not going to."****
>
> (Emphasis Added)

Continuing at page 32 (R)

> "Remember, the theatrics stated only after he was charged. Pretty hard to beat a charge like we have in this case because of the strong presumption that the Court will instruct you will apply. So some defense

had to be presented, and *I submit to you that the defense that the defense submitted to you in this case is subterfuge.*" ****

Continuing momentarily out of context at page 39 (R),

"It's your prerogative if you want to acquit *a strong armed robber, a so-called pimp, a so-called pusher.* That's your prerogative and, as a representative of you I will accept that verdict, but *I will not agree with you.*

(Emphasis Added)

Comments as stated above are intended to inflame the jury and deny the defendant a fair and impartial trial as provided by the 5th and 6th Amendments to the United States Constitution.

State of Ohio, Appellee v. Cloud, Appellant, 172 Ohio Appellate, 208, page 214, held as follows:

"The prosecutor in this instance was not referring to evidence disclosed in the record. This statement does not urge the jury to convict after a careful unbiased consideration of the facts but rather to convict on an emotional appeal based on the public demand to stamp out the narcotics evil, the sole effect of which could only have been to arouse passion and prejudice against the defendant."****

Continuing on page 217, the Court stated:

****"Arguments of counsel in the trial of a lawsuit are permitted for the sole purpose of aiding the jury in analyzing the evidence and thus assist it in determining facts of the case. *Argument made to incite a jury to convict to meet a public demand are inimical to basic rights of a defendant, since they prevent him from having a fair and impartial trial to which he is entitled under the law.*"****

(Emphasis Added)

The law is clear that where remarks are made by counsel that are clearly the basis of a mistrial and objections to the same would only magnify the statements, objections and or admonitions would only aggravate the situation.

Some improprieties may be so gross that no instructions would yield a correction. Bruton v United States (1968) 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620.

Apparently, The United States Court of Appeals for the Sixth Circuit, agrees with the contention of counsel by their opinion but evade the problem by referring to Chapman v California, 368 U.S. 18 (1967). However, counsel for the petitioner maintains that because of Federal Law granting freedom to an accused on the basis of insanity takes this case out of Chapman v California, *supra.*

It is difficult to try a narcotics case today under any circumstances. TV, newspapers, radio and governmental propaganda, right or wrong has influenced the minds of the public and prospective jurors. On the face of it the Court can say the error was harmless and the case proven beyond a reasonable doubt. The question is what case? The case that the petitioner had the narcotics and the guns or that the petitioner was sane?

In the midst of the drug era and applying the total misconduct of the attorney for the United States, the jury under the law could not consider the question of insanity and certainly this cannot be considered harmless error. The evidence as to insanity was not proven beyond a reasonable doubt.

To allow the appellate decision to stand would be to disinfranchise the protective rights guaranteed by the 5th and 6th Amendments of the United States Consitu-

tion. To make a distinction of "Harmless Error" each case must stand on its own.

Quoting from Chapman v California, *supra,*

> "There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."

It can still be argued that Chapman v California, *supra,* differs because it deals with failure to testify by a defendant.

How, under the facts of this case, can it be said that the atmosphere created by the attorney for the United States Government did not contribute to the defendant's conviction.

The defense of insanity is a separate issue. The jury can be convinced and the evidence conclusive beyond a reasonable doubt the defendant is guilty. This determination must be considered separately by the jury because the plea is two-fold.

After one of the most inflammatory closing arguments ever given, and recognized by the, appellate court, the jury could not consider the question of insanity nor can the appellate court based on the evidence say the evidence showed beyond a reasonable doubt the petitioner's sanity.

Through long hard experience it has been proven judges are human and subject to human frailties, and it appears the Appellate Court, has been caught up in the mood of the nation. Let not this Court of Last Resort be caught by the same mood but be conditioned by the spirit of the Constitution and the rights of the individual. As a matter of justice this writ should be allowed.

II.

3. THE VARIOUS COUNTS IN THE INDICTMENT CHARGE MORE THAN ONE OFFENSE IN EACH SEPARATE COUNT OF THE INDICTMENT AND AS

A DIRECT RESULT THE GOVERNMENT FAILED TO PROVE THE ESSENTIAL ELEMENTS OF THE VARIOUS COUNTS CONTAINED IN THE INDICTMENT.

Counts I, II, V and VI of the Indictment deprive the defendant of the guarantees provided by the 5th Amendment of the United States Constitution.

41 Am Jr 2*d*, Indictments and Information, Section 213, at page 1012 reads as follows:

> "****Under the Federal Rules of Criminal Procedure two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offense charged whether felonies or misdemeanors or both, are of the same or similar character or based on the same act or transaction or two or more acts or transactions connected together or constituting parts of a common scheme or plan."
>
> Rule 8 (a) Federal Rules of Criminal Procedure. Under this rule, charging of two offenses in one count is erroneously duplicity.
>
> United States v Gibson (CA2 N.Y.) 310 F 2d 79

It is obvious that counts I and II contain at least 3 separate and distinct offenses in each count. The elements of each crime may not be the same and therefore separable. However, each one must be proven by itself including each and every element.

By allowing all of the offenses to remain in Count I and II of the indictment the petitioner is deprived of both the guarantees of the 5th and 6th Amendments of the Federal Constitution.

As to counts V and VI of the indictment they are similar and the conviction of one precludes the conviction under the other as a violation again of both the 5th and 6th Amendments of the Federal Constitution.

Further, the count involving conviction under state statute is not part of a common plan or scheme nor based on the same transaction.

CONCLUSION

It is respectfully submitted that the petitioner has been denied a fair trial and due process of law as provided by the 5th and 6th Amendments of the United States Constitution.

It is obvious by its own decision that Appellate Court failed to recognize that harmless error in this case is two fold (1) that the government proved the defendants guilt beyond a reasonable doubt. (2) that the government proved the defendant's sanity beyond a reasonable doubt. As to the latter by it's own decision, it completely ignores the fact that the jury could not decide that issue after the inflammatory remarks of counsel for the government.

Further, that the various counts of the indictment are in conflict and further deprive the petitioner of his rights as guaranteed by the 5th and 6th Amendments of the United States Constitution.

For the reasons set forth hereinabove, this petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Petition for a Writ of Certiorari was mailed this 29 day of July, 1971 to the United States Attorney's office, U.S. Post Office Building, Cincinnati, Ohio.

JERRY WEINER

EXHIBIT A

[Not to be printed or published]

NO. 71-1244

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plantiff-Appellee

VS.

JOHN OLIVER SNOW,
Defendant-Appellant

[Decided and Filed June 8, 1971]

BEFORE: WEICK, PECK, and McCREE, Circuit Judges.

PER CURIAM. Appellant was convicted by a jury of four narcotics offenses concerning the unlawful possession of firearms, and was given an aggregate sentence of twenty-one years. A consensual search of appellant's person and automobile disclosed quantities of heroin, cocaine, marihuana, narcotics paraphernalia and a loaded pistol. His appeal presents essentially three issues: (1) Whether the argument of the United States Attorney was impermissibly prejudicial, (2) Whether the Government sustained its burden of proving appellant's sanity and the elements of the offenses charged, and (3) Whether the sentence of 21 years constitutes cruel and unusual punishment.

The United States Attorney made a frank appeal to the emotions of the jury by making personal references to the threat that the narcotics traffic presents to his children and to theirs. His exhortation to convict appellant in order to eradicate a source of the peril was improper. A lawful conviction can result only from the convincing quality of the evidence. Nevertheless, the evidence of guilt in this record is so overwhelming that

we conclude that any error injected by improper argument was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

Our determination of the first issue necessarily decides the second one adversely to appellant. We have examined the several volumes of the transcript of proceedings filed with the Clerk and we are satisfied that the jury's verdict has ample evidentiary support.

Finally, on the issue concerning the sentence, we observe that the maximum possible sentence was 72 years, and that the 21 year sentence imposed is within the statutory limits and therefore does not constitute cruel and unusual punishment. *E.g., Akers v. United States*, 280 F. 2d 198, 199 (6th Cir. 1960), *cert. denied*, 364 U.S. 924 (1960).

Affirmed.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
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Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Southern District of Ohio, petitioner was convicted on six counts charging (1) purchase and distribution of heroin not from a stamped package, in violation of 26 U.S.C. (1964 ed.) 4704(a); (2) a similar violation as to cocaine; (3) concealing unlawfully imported heroin, in violation of 21 U.S.C. (1964 ed.) 173; and (4) a similar violation as to cocaine; (5) concealment of a firearm during commission of a federal felony, in violation of 18 U.S.C. 924(c)(2); and (6) purchasing another firearm after conviction of a felony in violation of 18 U.S.C. App. 1202(a)(1). Sentences aggregating twenty-one years' imprisonment were imposed, 10 years on each of counts 1

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and 2; 10 years on counts 3 and 4 to run concurrently with each other but consecutively to 1 and 2; and an additional one year sentence on counts 5 and 6. The court of appeals affirmed.

Petitioner seeks reversal of his conviction on the ground that the vigorous closing argument of government counsel, inveighing against drug traffic, denied him due process of law. The court of appeals found the prosecutor's argument improper, but the error harmless. *Kotteakos* v. *United States,* 328 U.S. 750. Cf. *Chapman* v. *California,* 386 U.S. 18 (standards for harmless constitutional error). See *Chatman* v. *United States,* 411 F. 2d 1139 (C.A. 9); *Tenorio* v. *United States,* 390 F. 2d 96, 99 (C.A. 9). The court's conclusion that any impropriety in the prosecutor's summation was harmless error is well founded.

On April 16, 1970, Detectives of the Hamilton County, Ohio, Sheriff's Department and Special Agents of the Alcohol, Tobacco and Firearms Division of the Treasury Department, having been informed that petitioner had been observed by a hotel busboy in possession of a gun and a quantity of money, approached the petitioner at the hotel and asked if he had a gun, which he denied. They asked for and obtained consent to search the petitioner's car. Petitioner removed from the trunk a cloth bag containing a box, which he opened showing that it contained no gun. The officers recognized implements used in the narcotics trade and after brief questioning and a scuffle arrested the petitioner.

A search of the petitioner revealed a .25 caliber automatic concealed on his person. Searches of his car

revealed a second handgun and the heroin and cocaine introduced at trial.

Petitioner also argues that he was denied due process of law with respect to his defense of insanity (based on his narcotics addiction) because a verdict of not guilty by reason of insanity would result in his immediate release—a result which a jury would find intolerable. Such a consequence is by no means the invariable result of an acquittal by reason of insanity in federal courts.[1] In any event, however salutory it would be for Congress to legislate more explicitly in this area, nothing in the Constitution requires Congress to provide either special institutionalization or treatment for insane defendants.

Finally petitioner contends that counts 1 and 2, charging the "purchas[ing] distribut[ing] *and* dispens[ing]" of narcotics improperly "contain at least 3 separate and distinct offenses" (Pet. 9). An indictment may properly charge that a statute which may be violated in several ways was violated in each of those ways. *Turner* v. *United States*, 396 U.S. 398, 420 (so construing an indictment charging violation of 26 U.S.C. 4704(a), the statute involved in this case). Nor is petitioner correct in concluding that conviction on count 5 precluded conviction on count 6; not only

[1] See *Lyles* v. *United States*, 254 F. 2d 725 (C.A.D.C.), certiorari denied, 356 U.S. 961; *Pollard* v. *United States*, 285 F. 2d 81 (C.A. 6); *United States* v. *Freeman*, 357 F. 2d 606, 625–626 (C.A. 2); *Pope* v. *United States*, 372 F. 2d 710, 731–732 (C.A. 8) (*en banc*), reversed and remanded on other grounds, 392 U.S. 651; 24 U.S.C. 211; Goldstein, *The Insanity Defense*, 143 *et seq.* (1967).

are the elements of the offense different, but the charges related to different handguns.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

U.S. GOVERNMENT PRINTING OFFICE, 1971